

Appeal from a decision of the Las Vegas District Office, Bureau of Land Management, dismissing protests to the issuance of communications site right-of-way N-39524.

Remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--  
Rights-of-Way: Applications

When various right-of-way grantees who utilize helicopters to access a communication site object to the grant of a subsequent right-of-way to another applicant on the ground that the right-of-way will interfere with helicopter access, and the record establishes that there has been no authorization to use a helicopter to access the site, the case files will be remanded to BLM so that it may take affirmative action to either prohibit or formally permit such use.

APPEARANCES: Janet F. Phillips, Esq., Las Vegas, Nevada, for appellants KLAS, Inc., and Valley Broadcasting Company; T. L. Metcalfe for Central Telephone Company of Nevada.

#### OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision dated May 10, 1985, the Las Vegas District Office, Bureau of Land Management (BLM), rejected various protests to the issuance of a communications site right-of-way on the Upper Potosi Communication Site to Advanced Communications Inc. (ACI). On June 3, 1985, KLAS, Inc., and Valley Broadcasting Company, d.b.a. Microwave, Inc., filed a notice of appeal. On June 6, 1985, Central Telephone Company of Nevada also filed a notice of appeal. Appellants are holders of earlier issued rights-of-way on Mt. Potosi.

Mt. Potosi is the site of a major BLM communications site serving the Las Vegas area. It is located in the Bird Spring Range on the southern end of the Spring Mountains. Two separate peaks have been developed at the site, but, until recently, development has proceeded in a relatively haphazard manner. In 1987, BLM adopted the Upper Potosi Mountain Communication Site Management Plan in an effort to provide for the orderly development of the site.

ACI originally made application for a right-of-way on Mt. Potosi on April 23, 1984. ACI proposed the construction of a 30-foot self-supporting tower and requested an area 15 by 20 feet for a prefabricated structure. The application noted that "[t]he building and tower will be located so as not to interfere with the existing microwave links or helicopter access." The application further provided that access to the site would be from "the existing road for construction and service as well as helicopter access."

Pursuant to ACI's request, the right-of-way originally issued on August 23, 1984. Subsequent thereto, BLM received various protests from holders of previously issued rights-of-way alleging that they had not been notified of the pending application in advance of the right-of-way grant. By Notice dated November 1, 1984, BLM ordered ACI to suspend all activities under the right-of-way on the ground that BLM had neglected to notify exist-ing users of the application filed by ACI.

Formal notice of ACI's application was sent to the existing site users on November 29, 1984. Numerous protests were received. The majority of the protests were directed to the impact of the proposed right-of-way on helicopter access to the site. In evaluating these protests, the District Office requested the assistance of the State Office. In the memorandum requesting this assistance, dated April 2, 1985, the District Manager noted that "[w]e are proposing to have either a helicopter pilot or someone knowl-edgeable about the mechanics of flying visit the site with us and determine if the proposed improvements would impair the helicopter landing area."

By memorandum dated April 22, 1985, the State Director responded to the District Manager. The State Director noted that the State air officer and a technical specialist from the Office of Aircraft Services had visited the site. He also noted that "[t]he site was evaluated as an unimproved heli- spot since the current Bureau leases do not provide for helicopter access and the lessees, therefore, practice this at their own risk." The State Director noted that, subject to certain recommendations, "it was the con- sensus of this group \* \* \* that, in the majority of cases, access to Upper Potosi by helicopter would not be restricted nor would safety be compro- mised." (Emphasis in original.)

On May 10, 1985, the Las Vegas District Office issued the decision under appeal herein. In examining the question of helicopter access, the District Office declared:

Another issue raised was that the development by ACI would impair or eliminate helicopter access to the site. Although the helicopter landing area is not considered an authorized use of the site, we are addressing it because of your concerns. We realize that due to the poor condition of the access road and that during times of inclement weather, the only way to service the equipment on the site is by helicopter. The site was evaluated as an unimproved helispot since the current Bureau leases do not provide for helicopter access, and the lessees therefore, practice this at their own risk.

The decision noted further that, based on the analysis conducted by the State Office, in the majority of cases access to Upper Potosi by helicopter would not be restricted.

In their statement of reasons for appeal, KLAS and Valley Broadcasting essentially reiterate the arguments made in their protest, contending that "the Bureau's decision lacks adequate consideration of the practical aspects of helicopter ingress/egress to the site and the possible additional dangers and restrictions which would result from the proposed construction." Central Telephone bases its appeal on the ground that the movement by ACI of its facilities located on Upper Potosi Mountain might interfere with three point-to-point microwave systems which it has in operation. No response has been filed by either BLM or ACI.

Initially, we note that unauthorized use of Federal land constitutes a trespass. In the instant case, we have examined all of the right-of-way permits which have been issued for the Upper Potosi site and have determined that BLM is correct in its assertion that none of the grants authorized the use of any land on Upper Potosi Mountain as a heliport. Indeed, since issuance of the original right-of-way to Las Vegas Television, Inc., on October 20, 1964, to the present, every right-of-way which has issued has described access to the site as occurring along a road constructed by Las Vegas Television, Inc., extending 4.4 miles in length, commencing at Goodsprings, Nevada. This is the sole access authorized by any of the grants. <sup>1/</sup> Thus, use of the site as a heliport is in the nature of a trespass.

In Eugene M. Witt, 90 IBLA 330 (1986), we held that an interest arising out of trespass was an insufficient basis upon which to predicate standing to appeal under 43 CFR 4.410. Thus, it might be deemed proper, under normal circumstances, to dismiss the appeal filed by KLAS and Valley Broadcasting for this reason. Due to considerations which we set forth, however, we do not deem this course of action to be appropriate.

While, as we have indicated, our review of the various right-of-way grants makes clear that BLM has never formally authorized the use of helicopters to provide access to the site, <sup>2/</sup> save for construction purposes, the record is also clear that BLM has long been aware that helicopters were being used to access the site and, not only has BLM condoned such use, but has, at times, affirmatively indicated its support for such activities.

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<sup>1/</sup> The only exception appears in right-of-way N 4181, in which a Jan. 16, 1970, memorandum notes that the applicant "can use existing roads and a helicopter for construction." (Emphasis added.)

<sup>2/</sup> We do note that in a letter dated July 13, 1983, the Federal Aviation Administration (FAA) indicated that, because of the poor condition of the road, it intended to use helicopters to service right-of-way N 20002. This may have proved to be unnecessary since that right-of-way was amended on Aug. 29, 1983, to include the access road.

As noted above, the initial communications site right-of-way on Upper Potosi Mountain was issued to Las Vegas Television, Inc., predecessor of KLAS, Inc. That right-of-way grant included an access road, approximately 4.4 miles long, and 20 feet wide, aggregating approximately 10.8 acres in size. Subsequent grants on the mountain did not embrace this access road. Rather, these users made arrangements with KLAS, Inc., to share in the costs of maintaining the road. <sup>3/</sup> Over a period of years, as more and more individuals used the road, the condition of the road deteriorated. Ultimately, a major dispute ensued between KLAS and the FAA over damage allegedly caused during the construction of FAA improvements at the site. By 1983, BLM was aware of the deteriorated condition of the access road. <sup>4/</sup>

It seems clear that, owing both to the condition of the road and the severity of the winter weather, increasing numbers of permittees began using helicopters to gain access to the site, although there are also indications that use of helicopters considerably predated road access problems. Thus, in a letter, dated July 15, 1985, to the Operations Manager of KVBC, a copy of which was sent to the District Manager, BLM, the Coordinator of Communications for the State of Nevada declared:

In April of 1975, I had a conversation with James Saladin who was then the Bureau of Land Management's communications engineer. I mentioned to Mr. Saladin that the State would like to place a communications building in the same area that has been recently approved for a right-of-way for Advanced Communications. He stated that the remaining area on top of the hill was being reserved for a helicopter landing area; he further stated that a building in that area would create a hazard for a landing helicopter and that he would deny any applications for right-of-ways at that location. Subsequently, we were able to rent space from the Alta Corporation in their building for our radios.

Regardless of how much credence we should place on the recollection of a conversation which occurred over 10 years earlier, it is clear that in recent years, not only has BLM recognized the fact that helicopters were being used to reach the site, BLM has acted in such a manner so as to apparently sanction such use. Thus, in a memorandum dated November 11, 1985, from the Area Manager to the various users of the site, the Area Manager declared:

In accordance with Stateline Resource Area planning documents, no new communications sites will be authorized unless the applicant

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<sup>3/</sup> The only apparent exception to this procedure involved right-of-way N 20002, issued to the FAA and discussed in note 2, supra.

<sup>4/</sup> The FAA had complained to BLM about the poor state of repair of the right-of-way. A subsequent field inspection by the Area Office had confirmed FAA contentions. In response to an inquiry from BLM, KLAS informed BLM that the road had been damaged 3 years earlier as a result of FAA construction and that a lawsuit was then pending concerning the matter.

can justify that existing sites cannot be utilized due to technical parameters. If a new site is authorized, access will be by helicopter only. No new roads will be authorized. [Emphasis supplied.]

Despite the fact that BLM clearly recognized that many parties were obtaining access to the communications site via helicopters, no steps were taken to formally permit such activity either by amending the individual right-of-way grants or by making provision therefor in the Upper Potosi Mountain Communication Site Management Plan. 5/ The failure of BLM to take such steps places it in the position of condoning unauthorized use of the Federal lands. Moreover, by ignoring the fact that many, if not most, of the grantees were utilizing helicopter access, it is possible that BLM has compromised the environmental analyses which it has conducted in determining the impacts of proposed rights-of-way.

Thus, inasmuch as all environmental analyses have proceeded on the assumption that access to the site was by the road from Goodsprings, there has been no analysis of the impact of helicopter usage (particularly with respect to noise pollution) on the surrounding lands. Indeed, with the exception of the instant appeal, it seems clear that there has been no comprehensive analysis of the impact of new rights-of-way on helicopter usage. The possibility therefore exists that developments which have a direct impact on public health and safety may be permitted without adequate prior consideration of those impacts by BLM. We do not mean to imply that helicopter access to the site should not be allowed. What should not continue, however, is BLM's passive acquiescence in an unauthorized use. BLM must take steps to either prohibit helicopter access or directly authorize such use.

Normally, given the facts as disclosed by the record herein, we would set aside BLM's decision and remand the matter for a reexamination of ACI's application in the context of an analysis of the desirability of permitting helicopter access. However, decisions granting rights-of-way are effective during the pendency of an appeal (43 CFR 2804.1) and it is possible, given the time that this appeal has been pending, that ACI has constructed its facility. Therefore, while we will remand this matter for further consideration by BLM, we will permit continued operations by ACI under this right-of-way grant. We do note, however, that in its application ACI indicated that it intended to use both the road and helicopters to access the site. The right-of-way granted to ACI clearly does not embrace the area used for helicopter landings nor, indeed, has any permittee been granted the use of that area for helicopter access. Until such time as BLM directly authorizes helicopter access, it may not be allowed.

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5/ We think it clear that use of helicopters to access the rights-of-way could not be justified as constituting "casual use" under 43 CFR 2800.0-5(m).

Finally, we note that Central Telephone's appeal raised different issues relating to impacts of the right-of-way on its point-to-point microwave systems. These arguments should be reexamined on remand. See generally Williamette Logging Communications, Inc., 86 IBLA 77 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is remanded for further action consistent herewith.

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James L. Burski  
Administrative Judge

We concur:

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R. W. Mullen  
Administrative Judge

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Gail M. Frazier  
Administrative Judge